BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER G. THORNE	)	
Claimant	)	
VS.	)	
	)	
SEATON CORPORATION[1]	)	Docket No. 1,056,074
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requested review of Administrative Law Judge Kenneth J. Hursh's November 14, 2012 Award. The Board heard oral argument on April 3, 2013. Geoffrey Clark, of Pittsburg, Kansas, appeared for the claimant. John A. Pazell, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Hursh adopted the rating opinions of Dr. Prostic and Dr. Clymer who found that claimant had a 20% functional impairment to the whole body. Judge Hursh adopted the task loss opinion of Dr. Prostic of 80%. Judge Hursh awarded claimant a 90% work disability based on averaging the 80% task loss and 100% wage loss in the amount of $62,111.99. While claimant testified he was subject to a child support lien, Judge Hursh noted the Award "shall not contain an assignment of compensation for a child support lien" because the record did not demonstrate the amount of the support order, the arrearage owed and the payee, as required by K.S.A. 44-514.[2]

The Board has considered the record and adopted the stipulations in the Award.

ISSUES

Respondent requests the Board reverse Judge Hursh's Award and find claimant is only entitled to benefits based on functional impairment, or in the alternative, adopt the task loss opinion of Dr. Clymer. Respondent also requests that Judge Hursh's decision regarding the child support lien be reversed because both parties were aware of the lien.

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[1] Seaton Corporation is called "Staff Management" by the parties. (R.H. Trans. at 12).

[2] ALJ Award at 4.

Claimant argues the Kansas Supreme Court correctly decided *Bergstrom* and the Board may not overturn such decision. Claimant takes no position regarding the child support lien. Claimant maintains that Judge Hursh's Award should be affirmed.

The parties agreed at oral argument that claimant is subject to the "Order for Involuntary Assignment of Worker's Compensation" that was filed in the District Court of Leavenworth County on March 15, 2012. The Board takes judicial notice of such order, which claimant's attorney attached to his submission brief.

The remaining issue is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent from October to December 2009. Claimant used a manual pallet jack to move pallets of clothes weighing approximately 300-500 pounds. On December 12, 2009, claimant was moving a loaded pallet. The wood on the bottom of the pallet broke. As claimant pulled forcefully, he felt a popping sensation and excruciating pain in his low back. Claimant continued to work, but his condition worsened to the point where he was unable to rise from a sitting position in the break room on December 17, 2009, his last date of employment with respondent. Claimant notified his supervisor who sent him to the Ransom Memorial Hospital emergency room.

Claimant was initially treated by Robert Gollier, M.D., who provided an injection, prescribed medications and ordered an MRI which showed a bulging disk. Claimant was released to light duty. Respondent was unable to provide accommodated work.

Claimant was referred to Mark Greenfield, M.D. After several epidural blocks failed to provide relief, Dr. Greenfield performed a percutaneous discectomy on April 8, 2010. Claimant testified that while initially experiencing relief following surgery, his pain worsened during physical therapy and from simply walking. A second surgery was recommended. On December 27, 2010, claimant underwent a lumbar fusion by Michael Lowry, M.D.

Claimant testified that after he was released in April of 2011, he telephoned respondent about returning to work and was told they had just laid everybody off and to call back later. Since then, claimant has not applied for work anywhere and is currently enrolled in introductory computer courses.

On May 24, 2011, claimant was evaluated by Edward J. Prostic, M.D., at the request of claimant's attorney. Dr. Prostic is a board certified orthopaedic surgeon and certified as an independent medical examiner. Claimant complained of constant ache in the center of his low back below the waist and radiation to both posterior knees with numbness and tingling. Dr. Prostic took new x-rays that showed no evidence of bone graft. Dr. Prostic noted claimant needed continued medications, work conditioning, eventual work hardening and evaluation by a physiatrist.

Dr. Prostic's September 6, 2011 report indicated claimant had a 20% permanent partial impairment to the body as a whole pursuant to the AMA *Guides*[3] (hereinafter the *Guides*). Dr. Prostic noted claimant could only perform light duty employment. He restricted claimant against frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, and captive positioning.

After a September 7, 2011 preliminary hearing, Judge Hursh ordered an evaluation with Vito J. Carabetta, M.D., who evaluated claimant on October 17, 2011. Dr. Carabetta diagnosed claimant as being status post-lumbar fusion. Dr. Carabetta did not review any imaging studies. His report states claimant had x-rays with Dr. Prostic and that "it would appear that the fusion is indeed intact."[4] Dr. Carabetta noted physical examination showed some conflicting findings and irregularities. Dr. Carabetta found claimant to be at maximum medical improvement and utilizing the DRE method, provided a 20% whole person impairment pursuant to the *Guides*. Dr. Carabetta gave permanent restrictions of occasional lifting not to exceed 40 pounds, frequent lifting or carrying not to exceed 20 pounds, occasional bending or stooping activities, and frequent position changes.

Karen Terrill, a vocational expert, interviewed claimant on November 14, 2011, at the request of claimant's attorney. She compiled a list of 56 unduplicated tasks claimant performed in the 15-year period before his December 12, 2009 work-related accident.

At the March 1, 2012 regular hearing, claimant testified that he continued to have soreness in his lower back and both legs. He testified he is unable to sit for more than an hour due to his back cramping up and right leg numbness. He denied being able to bend over very far. Claimant also experiences pain shooting down the back side of his buttocks to his knee about two or three times a week. Claimant indicated the accident has interfered with his daily life as he is no longer able to ride a motorcycle or go horseback riding with his daughter. Claimant continues to see Dr. Lowry for Hydrocodone and Flexeril refills. He testified he is unable to work as a carpenter. He testified he has not worked subsequent to his accident. Claimant acknowledged the existence of a child support lien.

Ms. Terrill's deposition was taken on March 15, 2012. Ms. Terrill testified that it is unknown whether claimant is employable as it would depend upon whether an employer is willing to accommodate. Claimant testified that Ms. Terrill's task list was accurate.

On April 23, 2012, Terry Cordray, a vocational expert, interviewed claimant, at respondent's request. He compiled a list of 30 unduplicated tasks claimant performed in the 15-year period before his December 12, 2009 work-related accident.

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] Dr. Carabetta's 10-17-11 report at 3. Of some concern, Dr. Prostic came to the opposite conclusion after reviewing x-rays.

Claimant was evaluated by David J. Clymer, M.D., at respondent's request on June 11, 2012. Dr. Clymer is a board certified orthopaedic surgeon. Claimant complained of continued back and leg pain which is rather constant and aggravated by activity. Dr. Clymer noted "there is some irregularity of the facet joint at the L5-S1 level consistent with [claimant's] history of surgery and an attempted fusion at that level."[5] X-rays taken that day showed "some surrounding bony sclerosis which may be consistent with a solid fusion at that level."[6] Dr. Clymer diagnosed claimant with a lumbar disk abnormality at L5-S1. Dr. Clymer felt the fusion was stable and that claimant had reached maximum medical improvement. It was Dr. Clymer's opinion utilizing the DRE model, that claimant has a Category IV lumbosacral impairment, which represents a 20% impairment to the body as a whole pursuant to the *Guides*. Dr. Clymer provided the following permanent restrictions:

> I think he should avoid any repetitive bending and lifting activity but feel he could perform moderate bending and lifting provided he has good muscular tone and uses good lifting technique. I feel an appropriate lifting restriction would be 30 pounds frequent lifting and 40 pounds occasional lifting.[7]

Dr. Prostic's deposition was taken on July 13, 2012. Dr. Prostic reviewed a task loss prepared by Karen Terrill. Of the 56 unduplicated tasks on the list, Dr. Prostic opined claimant was unable to perform 45 for an 80% task loss. Dr. Prostic testified claimant's x-rays showed no evidence of a fusion having occurred and noted claimant's continued irritability of his low back was consistent with a poor surgical result and lack of stabilization that surgery was intended to provide. Therefore, Dr. Prostic felt more stringent work restrictions were appropriate. When questioned regarding how his restrictions compared to Dr. Clymer's, Dr. Prostic testified as follows:

Q. Okay. You had an opportunity to review Dr. Clymer's report?

A. Yes.

Q. And he gave [claimant] higher restrictions; is that correct?

A. He allowed [claimant] to lift more than I did.

Q. Okay. What would those restrictions be?

A. A single lift of 40 pounds, repetitious of 30.

Q. And do you agree with those?

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[5] Clymer Depo. Ex. 2 at 4.

[6] *Id.*

[7] *Id.*

A. I do not.

Q. And can you tell me why you don't agree with those?

A. When I saw this patient, he couldn't stand straight. He couldn't bend, twist, whatever. He couldn't do any significant lifting when I saw him. It's not humane.

Now, if he was significantly better when Dr. Clymer saw him, then if you can rehabilitate him and keep him that way, then perhaps you could get him a higher lifting limit. But as he was when I saw him, there is no way for him to make a living in the open labor market.

Q. Okay. And if he were lifting, say, 40 pounds occasionally, 30 pounds frequently, what would happen to him?

A. Well, if he develops a solid fusion at L5-S1, then he can go back to those activities. But if he never gets a solid fusion, then he'll be continuously aggravated by that activity.

Q. Okay. You said it was not humane. [Would h]e be in constant pain if he did those, lifted up to the 40 pounds and 30 pounds?

A. As he was when I saw him, definitely.[8]

Dr. Clymer's deposition was taken on August 29, 2012. Dr. Clymer reviewed Mr. Cordray's task list and opined claimant could perform 11 of the 30 unduplicated tasks on the list for a 37% task loss. Dr. Clymer testified that he believed claimant had a low back strain which was treated effectively with lumbar disc surgery and fusion. Dr. Clymer felt claimant's subjective complaints were much greater than he would have expected. When questioned regarding claimant's work restrictions, Dr. Clymer testified as follows:

Q. Let me ask you about ongoing work restrictions. What do you feel are [claimant's] current, ongoing work restrictions.

A. [Claimant] does have ongoing lower back discomfort and I expect some ongoing irritability after his surgery. Although that subjective irritability is more than I would expect, given the objective findings. In general, I would favor a gradually progressive activity and exercise program. But I think he probably should avoid heavier, awkward, repetitive bending or lifting. In general, I suggested an appropriate lifting restriction would be about 30 pounds frequent lifting and 40 pounds occasional lifting.[9]

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[8] Prostic Depo. at 11-12.

[9] Clymer Depo. at 13.

On cross-examination, Dr. Clymer further testified as follows:

> Q. And with regards to the – you have a pound restriction that you give. With regard to that, if he doesn't feel like he can tolerate the 30 pounds and the 40 pounds occasionally, should he do less than that?
>
> A. Well, I think every individual has to decide for themselves what they want to do in life, and so I wouldn't prevent him from making those decisions.[10]

Mr. Corday's deposition was taken on September 5, 2012. Mr. Corday testified that claimant is capable of employment as a retail salesperson, a parts counter worker, or as a computerized draftsperson and could earn between $9 and $10 an hour as a retail salesperson and over $35,000 a year as a CAD draftsperson.

Casey Brefeld, the managing director for Staff Management in Ottawa, testified on November 9, 2012. She testified that respondent has multiple job opportunities available that would fall within claimant's permanent restrictions, but confirmed there is no guarantee of permanent work as they are a temporary staffing firm. She seemed to agree that respondent made claimant some sort of job offer in October 2012.

Judge Hursh awarded claimant a 90% work disability based on the following:

> Dr. Prostic felt more stringent work restrictions were in order because the claimant's fusion surgery did not yield a good result. Prostic said the claimant's x-rays showed no fusion had occurred, and therefore the claimant should not lift as heavily as Dr. Clymer recommended. Dr. Clymer, however, described the claimant as having been treated effectively with lumbar disc surgery and one level fusion. The question of the claimant's post-injury task performing ability appeared to hinge on the quality of result from the fusion surgery.
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> In his written report, Dr. Clymer commented on the claimant's x-ray findings as "consistent with his history of surgery and an attempted fusion." He further found "some surrounding bony sclerosis which may be consistent with a solid fusion." Clymer's written report seemed less confident that an effective fusion had been achieved. Dr. Prostic felt the x-rays showed no evidence of a fusion having occurred. From all the evidence, it didn't look like the quality of result from the fusion surgery was as high as Dr. Clymer presumed when issuing his restrictions and determining task loss. Dr. Prostic's assessment of restrictions and task loss was considered more credible. It is held the claimant's task loss is 80%. This figure, averaged with the claimant's 100% wage loss yields a general "work" disability of 90%.[11]

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[10] *Id*. at 23.

[11] ALJ's Award at 4.

Judge Hursh also ordered that: (1) a four week temporary total disability credit would be applied against the award of permanent partial disability benefits; (2) no assignment of compensation for child support would be issued because the record contained none of the specifics of the order; (3) attorney Clark would be paid 81% of the attorney fee awarded, while claimant's prior attorney, Branson, would receive the remaining 19%; and (4) future medical would be addressed on a post-award basis, if necessary.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[12]

The existence, nature and extent of a claimant's disability is a fact question.[13] The trier of fact is not bound by medical evidence and must determine claimant's disability based on all the evidence, including deciding which testimony is more accurate and may adjust the medical, layperson and other testimony relevant to the question of disability.[14]

K.S.A. 44-510e(a) provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[12] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[13] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[14] *Id.* at 784-786.

An employee's work disability award is calculated under K.S.A. 44-510e(a) by averaging the employee's post-injury wage loss and task loss percentages. The reason for the employee's post-injury wage loss is irrelevant.[15]

ANALYSIS

Bergstrom dictates that claimant's work disability must be based on actual post-injury wage loss. Claimant has 100% wage loss. Under the pre-May 15, 2011 law, it is irrelevant if claimant has the capacity to earn post-injury wages. It does not matter if claimant inquired about returning to work or if respondent made him a job offer.

The Board adopts Judge Hursh's task loss analysis and conclusion that claimant has an 80% task loss. The Board adopts Ms. Terrill's task list as being more comprehensive and accurate than the task list compiled by Mr. Cordray. While neither list was perfect, Ms. Terrill accounted for claimant's various tasks in the U.S. Army as a combat engineer, drywall work, setting tile, concrete work[16] (including setting forms, assisting in placing concrete and finishing concrete), shoveling dirt, rough-in plumbing, installing siding, installing insulation, and building fences. Mr. Cordray excluded such tasks from his list. Mr. Cordray's list simply did not account for a substantial number of tasks that Dr. Clymer likely would have concluded claimant no longer had the ability to perform.

The Board finds that claimant's permanent partial disability benefits should be based on a 90% work disability.

The parties must honor the "Order for Involuntary Assignment of Worker's Compensation" dated March 15, 2012 that was filed in the District Court of Leavenworth County. The Order provided for an arrearage of $9,896.02 and that up to 40% of claimant's award was subject to the involuntary assignment. The Order further stated that Gallagher Bassett Services was to contact the Child Support Legal Enforcement Unit at (913) 684–0490 to determine the amount of arrears prior to paying out any settlement.

CONCLUSIONS

Claimant is entitled to permanent partial disability benefits based on a 90% work disability due to having proved 100% wage loss and 80% task loss, subject to the "Order for Involuntary Assignment of Worker's Compensation."

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[15] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 608-10, 214 P.3d 676, 678 (2009); see also *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197, 1201 (2010).

[16] While Mr. Cordray's report noted that claimant worked for J. E. Dunn as a concrete finisher, he testified that claimant did not do concrete work. (Cordray Depo. at 27-28, Ex. 2 at 5).

AWARD

WHEREFORE, the Board finds that Administrative Law Judge Kenneth J. Hursh's November 14, 2012 Award is modified as being subject to the "Order for Involuntary Assignment of Worker's Compensation" and to reflect that claimant is entitled to 89 weeks of temporary total disability compensation at the rate of $205.20 per week or $18,262.80, followed by 306.90 weeks of permanent partial disability compensation at the rate of $205.20 per week or $62,975.88 for a 90% work disability and a total award of $81,238.68.

As of April 24, 2013, there would be due and owing to the claimant 89 weeks of temporary total disability compensation at the rate of $205.20 per week in the sum of $18,262.80 plus 86.57 weeks of permanent partial disability compensation at the rate of $205.20 per week in the sum of $17,764.16 for a total due and owing of $36,026.96, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $45,211.72 shall be paid at the rate of $205.20 per week until fully paid or until further order from the Director. Pursuant to K.S.A. 2009 Supp 44-525(c), credit for the overpayment of 4 weeks of TTD shall be first applied to the final week of permanent partial disability and then to each preceding week until the credit is exhausted.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Kenneth J. Hursh